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No. 95-388

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

v.

PRO FOOTBALL, INC.,
d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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November 1995

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QUESTION PRESENTED

Whether members of a multiemployer bargaining unit are subject to antitrust liability to their employees for exercising, during the collective bargaining process, rights afforded them by the federal labor laws with respect to terms and conditions of employment.

PARTIES TO THE PROCEEDING AND RULE 29.6 LISTING

The parties to the proceeding are listed at Pet. ii-iii. The only corporate respondents with a parent company are Houston Oilers, Inc. (KSA Industries, Inc.) and Pro-Football, Inc. (Jack Kent Cooke, Incorporated). The only corporate respondents with a nonwholly owned subsidiary are Indianapolis Colts, Inc. (Colt Center Company) and Minnesota Vikings Football Club, Inc. (Minnesota Vikings Ventures, Inc.).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 50 F.3d 1041. The opinion of the district court (Pet. App. 64a-92a) is reported at 782 F. Supp. 125.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1995. A petition for rehearing was denied on June 12, 1995. The petition for a writ of certiorari was filed on September 11, 1995. The jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1254(1).

STATEMENT

1. Respondents, member clubs of the National Football League (NFL), are members of a multiemployer collective bargaining unit. Petitioners are members of the National Football League Players Association (NFLPA), the union certified as the exclusive bargaining representative of all NFL players. The subject matter of this litigation — the salaries of players eligible in 1989 to practice with NFL clubs but not to play in games — is a mandatory subject of collective bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*

In March 1989, as part of a series of roster reforms, the NFL authorized each member club to create a Developmental Squad, a group of six rookie or "first-year" players who would be permitted to practice with the club but not to play in games. To ensure that the most promising eligible players were not stockpiled or "stashed" by certain clubs on Developmental Squads, where they would be unavailable to other clubs needing their services in games, the NFL's authorizing resolution anticipated that all such players would be paid a uniform salary.

The NFL promptly sought to negotiate with the NFLPA terms and conditions of employment for Developmental Squad members. The NFLPA steadfastly refused to agree to a uniform salary. After four months of good faith efforts to

resolve the issue and with the parties plainly at impasse, the NFL unilaterally implemented its pre-impasse bargaining proposal, *i.e.*, that each Developmental Squad member be paid $1,000 per week, slightly less than the collectively bargained minimum salary for regular roster players. During the 1989 season — the only season at issue — 236 Developmental Squad members were each paid $1,000 per week for their practice services.

2. In May 1990, petitioners filed this lawsuit alleging that the NFL's implementation of the uniform salary term violated Section 1 of the Sherman Act.

In June 1991, after a class had been certified, the district court (Lamberth, J.) granted plaintiffs' motion for partial summary judgment, and denied the NFL's cross-motion, on the issue presented here: whether plaintiffs' claims were barred by the nonstatutory labor exemption from the antitrust laws. The district court held that implementation of the uniform salary term was not protected from antitrust challenge; it concluded that the exemption (1) had ended upon expiration of the previous collective bargaining agreement between the NFL and the NFLPA, (2) had ended when the parties reached impasse on the uniform salary issue, or (3) did not apply because the challenged restraint had not previously been embodied in a collective bargaining agreement. Pet. App. 72a-90a.[1]

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[1] The district court subsequently granted plaintiffs' motion for partial summary judgment, holding, under the rule of reason, that implementation of a uniform salary term violated Section 1 of the Sherman Act as a matter of law. Pet. App. 110a-114a. The damages issue was then tried to a jury, which was repeatedly told that the NFL had violated the antitrust laws. The jury returned a verdict that, after trebling, resulted in a judgment against the NFL of more than $30 million.

3. a. The court of appeals reversed. Pet. App. 1a-60a. Chief Judge Edwards' opinion for the court recognized that by implementing a collective bargaining proposal that had been negotiated in good faith to impasse, the NFL was exercising a fundamental labor law right. The court observed that this Court's precedents had "made clear that an employer's right to 'institute unilaterally the working conditions which he desires' is among the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." *Id.* at 23a (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316 (1965)). The court therefore determined that the NFL had been held liable under the antitrust laws for doing "exactly what federal labor policy condones." Pet. App. 5a.

For that reason, and because the uniform salary term had no anticompetitive impact on the market for the League's entertainment product, *id.* at 29a & n.8, the court of appeals held that the NFL is "exempt from Sherman Act liability in this case." *Id.* at 32a. The court of appeals determined that

> restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining relationship. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with the weapons provided by the federal labor laws.

Pet. App. 4a-5a.

In reaching that conclusion, the court of appeals recognized that although the antitrust laws may apply to restraints on competition in *non*-unionized labor markets, "the

inception of a collective bargaining relationship between employees and employers irrevocably alters the governing legal regime. . . . [O]nce collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 24a-25a.

In addition, reacting to petitioners' suggestion that such "routine practices of multiemployer bargaining violate the antitrust laws," Pet. App. 26a, the court reasoned:

> If the Players had been negotiating with a single football team (instead of the multi-employer group), there is no doubt whatsoever that that single employer lawfully could have taken unilateral action to impose a fixed salary for practice team players after bargaining in good faith to a point of impasse. Indeed, the players do not assert otherwise, for they recognize that this is standard fare in labor law. And nothing in the antitrust law is intended to proscribe such unilateral action by a single employer. So the heart of the Players' position appears to be that the presence of a multi-employer bargaining unit should make a difference under the antitrust law. This is a wholly untenable position . . . .

Pet. App. 25a. *See also id.* at 25a-28a (discussing precedents and legislative history).

In holding that "restraints on competition imposed through the collective bargaining process [are exempt], so long as such restraints operate primarily in a labor market characterized by collective bargaining," Pet. App. 29a, the court of appeals expressly agreed with decisions of the Eighth Circuit and the Second Circuit that had previously so held. Pet. App. at 21a-

22a, 25a-28a (citing *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), and *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137)).[2]

b. Judge Wald dissented. Pet. App. 34a-60a. Recognizing that the majority's decision was supported by decisions of the Eighth and Second Circuits, she nonetheless began with the premise that "[p]recedent is of limited assistance" in deciding the issue. Pet. App. 45a. She expressed the view that the majority's decision would allow employers to "impose labor market restraints that heretofore might have exposed them to antitrust liability" and would thereby "create[] new asymmetries in bargaining relationships." Pet. App. 46a, 49a.

Judge Wald joined the majority in recognizing that the nonstatutory labor exemption *does* embrace "multiemployer bargaining tactics" to which the union has not agreed, including actions by members of a multiemployer bargaining unit to lock out their employees. Pet. App. 53a n.7. She nonetheless proposed a rule — different from the respective rules urged by petitioners and the government here — that would exclude from the scope of the exemption "unilateral imposition of terms at impasse" even though, as she acknowledged, such employer actions "*sometimes* have tactical significance." Pet. App. 57a (emphasis in original).

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[2] Because the nonstatutory labor exemption issue was "dispositive," Pet. App. 9a, the court of appeals determined that it did not need to address the NFL's challenges to the Section 1 ruling or the damages issues. *Id.* at 4a.

Judge Wald would, in any event, have reversed the judgment and remanded on the ground that the district court had erred in granting summary judgment to petitioners under the antitrust rule of reason issue. Pet. App. 36a n.3.

c. The court of appeals denied rehearing en banc, over Judge Wald's dissent. Pet. App. 62a-63a.

REASONS FOR DENYING THE WRIT

Petitioners urge review by this Court principally on the ground that "the courts of appeals are sharply divided" over the question presented here, and that the decision below "represents a radical departure from the established test applied by the other circuits." Pet. 14. Petitioners are wrong, as the government's *amicus* brief *expressly* confirms. U.S. Br. 11.

The Solicitor General acknowledges that in 1991, when this Court declined to review the Eighth Circuit's decision in *Powell*,[3] "there was no conflict among the circuits on the precise issue presented." U.S. Br. 11. The Solicitor General also candidly admits that "[s]ince *Powell*, no conflict in the circuits has developed." *Id.* Indeed, as the government correctly recognizes, "the D.C. Circuit [in this case] and the Second Circuit [in *Williams*] have agreed with the Eighth Circuit [in *Powell*] that conditions of employment unilaterally imposed on unionized employees [through the exercise of labor law rights] by multi-employer associations may not be challenged under the antitrust laws." U.S. Br. 11. *See Williams*, 45 F.3d at 692 ("We thus agree with the decision in *Powell*"); Pet. App. 21a (same).

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[3] *See Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

Although the government continues to take issue with this consistent line of holdings, the D.C. Circuit and the Second Circuit, like this Court when it declined to review the Eighth Circuit's decision in *Powell*, had before them the government's briefs urging a different result. In each case, the government's position was rejected — not cavalierly, but rather with extended, thoughtful, and analytical opinions, each consistent with and reinforcing the others, by distinguished jurists with substantial experience in the governing areas of law.[4]

None of the arguments advanced in support of the petition warrants immediate review. The issue presented, which has received thoughtful treatment from three courts of appeals that have all reached the same result, has arisen only rarely, and not at all outside the specialized area of collective bargaining between professional sports leagues and their players. Recent experience confirms that the decisions of the courts of appeals have not adversely affected the collective bargaining process. And the courts of appeals have rejected the "dizzying array" of alternative proposals — "not one of [which] makes the slightest sense under established labor law principles" — offered by petitioners, the government and various commentators who favor excluding from the exemption one or more aspects of the collective bargaining process. Pet. App. 20a, 21a. Unless and until a conflict among the circuits results from these varied proposals, review by this Court is unwarranted.

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[4] The Second Circuit's unanimous opinion in *Williams*, for example, was written by Judge Winter and joined by Judges Pratt and Calabresi. Judges Meskill and McGlaughlin joined Judge Winter in the Second Circuit's recent unanimous decision in *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995), which reached the same result. Chief Judge Edwards wrote the opinion for the court below, in which Judge Randolph joined.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OR WITH PRIOR DECISIONS OF THIS COURT.

A. Petitioners' primary argument (Pet. 3-5, 14-20) is that the courts of appeals are in conflict on the question whether union consent to a challenged restraint is *necessary* for the nonstatutory labor exemption to apply. As the Solicitor General recognizes (U.S. Br. 11), there is no such conflict. Although several courts of appeals have considered whether a union-employer agreement is *sufficient* for the exemption to apply, *every* court of appeals to rule on the question presented here — whether a union-employer agreement is *necessary* — has rejected petitioners' position. *See Powell v. National Football League*, 930 F.2d 1293, 1298 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed* (U.S. July 24, 1995) (No. 95-137); *Caldwell v. American Basketball Ass'n*, 66 F.3d 523 (2d Cir. 1995).[5]

Petitioners rely principally on *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). Indeed, they use the phrase (Pet. 18) "*Mackey* circuits" to refer to circuits that assertedly are in conflict with the D.C. Circuit's decision below, even though the circuit in which *Mackey* was decided has rejected petitioners' position.

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[5] Petitioners' counsel of record perceived no such conflict when, urging review and reversal of the Eighth Circuit's decision in *Powell*, as Solicitor General he informed this Court that *Powell* "does not conflict with any decision of this Court, nor is there a conflict in the circuits." Brief for the United States, No. 89-1421, at 17. Here, however, relying principally on cases decided prior to *Powell*, he asserts a conflict that warrants this Court's review.

In *Mackey*, the Eighth Circuit considered whether the nonstatutory labor exemption applied to restraints in a collective bargaining agreement; the issue presented there was whether union agreement was *sufficient* to require application of the exemption. *Mackey* did not consider whether an agreement was *necessary* for the exemption to apply. In its subsequent opinion in *Powell*, the Eighth Circuit made that absolutely clear: "Our discussion in *Mackey* was couched in terms of 'agreements' because in that case we were presented with [restraints] incorporated by two bargaining agreements." 930 F.2d at 1298.

In *Powell*, the Eighth Circuit held that the non-statutory labor exemption shielded from antitrust liability not only terms and conditions of employment that had been part of an expired collective bargaining agreement, but also additional terms (known as "Plan B") that the NFL, consistent with its rights under the labor laws, had implemented *without union agreement* after bargaining in good faith to impasse. *See Powell*, 930 F.2d at 1303 n.10. The Eighth Circuit ruled in *Powell* that agreement on the challenged restraint was not necessary, holding that after impasse the exemption protects from antitrust challenge a "unilateral change in terms and conditions of employment." *Powell*, 930 F.2d at 1302; *see id.* at 1300-01 (the exemption applies to "new or different employment terms that [were] reasonably contemplated within the scope of their pre-impasse proposals").[6] In short, as the

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[6] *See also* Petition for a Writ of Certiorari in *Powell v. NFL*, No. 89-1421, at 3 (In addition to the restraints "originally contained in a now expired collective bargaining agreement, . . . NFL owners have gone even further and unilaterally agreed to implement a new anticompetitive system called 'Plan B,' not contained in *any* previous agreement with the players." (emphasis in original)); *id.* at 7 (Plan B "had *never* been approved in or made part of any union agreement." (emphasis in original)); *McNeil v. National Football League*, 790 F. Supp. 871, 876 n.4 (D. Minn. 1992)

government has recognized here, the law of the Eighth Circuit — *the "Mackey* circuit" — is fully in accord with the decision below.[7]

The law of the other so-called "*Mackey* circuits" is also in accord. In *Prepmore Apparel, Inc. v. Amalgamated Clothing Workers*, 431 F.2d 1004 (5th Cir. 1970), *cert. dismissed*, 404 U.S. 801 (1971), the Fifth Circuit considered the union's antitrust claim that Prepmore and another company had conspired to refuse to deal with the union concerning wages and working conditions. Even though the alleged restraint was not the subject of an agreement between labor and management, the Fifth Circuit affirmed dismissal of the antitrust claim on the basis of the nonstatutory labor exemption. *Id.* at 1007.[8]

("NFL defendants implemented [Plan B] without the approval of either the players or the NFLPA.").

[7] *See also Amalgamated Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979). *Wetterau*, decided soon after *Mackey*, involved an agreement between employers to replace striking workers with non-union employees. As here, management and labor had not agreed on the challenged restraint, which was implemented as part of the collective bargaining process. Nonetheless, after first determining that the challenged conduct was lawful under the labor laws, the court held that the nonstatutory labor exemption barred the antitrust claim. *Id.* at 135-36.

[8] *United Brotherhood of Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), does not raise any conflict with the decision below. In that case, the court said that "in order for a restraint of trade to be actionable under the Sherman Act, there must be a restraint upon commercial competition in the marketing of goods or services." 690 F.2d at 532 (citation omitted). Petitioners have conceded that there is no such restraint here. *See* Pet. 29a & n.8.

Petitioners' roster of "*Mackey* circuits" also includes the Ninth and Sixth Circuits. *See* Pet. 16. But the decisions upon which petitioners rely do not address the issue presented here — whether an agreement is *necessary* for the exemption to apply — and both courts have indicated in other cases that such agreement is *not* necessary.[9]

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[9] From the Ninth Circuit, petitioners rely on *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391 (9th Cir. 1987). That case considered only whether an employer-union agreement is *sufficient* to fall within the exemption. In *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987), the court recognized that the nonstatutory exemption is *not* "limited to restraints imposed by collective bargaining agreements."

The law is the same in the Sixth Circuit. In *In re Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992), local auto dealers agreed to close their showrooms on Saturdays and certain evenings. Because the challenged restraint was outside the scope of the collective bargaining process, the exemption did not apply. The court of appeals nevertheless observed that "[t]o say that collective bargaining is at the heart of the non-statutory labor exemption, however, is not to say that the exemption only applies to collective bargaining agreements." *Id.* at 466. *See also Newspaper Drivers & Handlers' Local 372 v. NLRB*, 404 F.2d 1159, 1163 (6th Cir. 1968) (holding that lockout, to which union had not agreed, did not violate antitrust laws), *cert. denied*, 395 U.S. 923 (1969).

In *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1203 (6th Cir. 1979), upon which petitioners also rely, the Sixth Circuit held that the challenged restraint, to which the union had agreed, was protected by the exemption; the court never suggested that an agreement was *necessary* for such a result. Judge Wald was therefore incorrect in suggesting that *McCourt* "refused to extend [the exemption] beyond employer-employee agreements." *See* Pet. App. 44a-45a. (*McCourt* was the sole appellate decision on which Judge Wald relied in concluding that, notwithstanding the holdings of *Powell* and *Williams*, "[p]recedent is of limited assistance in deciding" the issue presented here. Pet. App. 45a.)

In sum, the current Solicitor General is correct in recognizing that there is no circuit conflict on the question presented in this case. Petitioners' arguments to the contrary are spurious.

B. The prior decisions of this Court addressing the nonstatutory labor exemption plainly have not held that union agreement is required for the nonstatutory labor exemption to apply. Petitioners' implication to the contrary (Pet. 15-16) is undermined by the government's brief, in which the current Solicitor General reminds the Court of the government's position in *Powell*: "we suggested that . . . the question was then one of first impression." U.S. Br. 11. *See also* Pet. App. 13a-14a; p. 9, n.5, above. That suggestion was plainly correct.[10]

Forced to look further afield, petitioners assert (Pet. 20-26) that the decisions of the Second, Eighth, and District of Columbia Circuits conflict with the reasoning of two other lines of decision by this Court. These attenuated contentions are without merit.

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[10] This Court's prior decisions in this area each addressed an alleged *product* market restraint challenged by a party outside the collective bargaining relationship. *See Connell Constr. Co., Inc. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 635 (1975) (the question is whether the challenged action "has a potential for restraining competition in a business market in ways that would not follow naturally from elimination of competition over wages and working conditions"); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local 3, International Brotherhood of Elec. Workers*, 325 U.S. 797 (1945). *See generally* Pet. App. 14a-15a. None of those cases holds that union consent is required for the exemption to apply in any case, much less a case, such as this, in which the restraint affects only the parties to the collective bargaining relationship.

1. Petitioners contend (Pet. 21-23) that the court of appeals' decisions conflict with statements by this Court that "[i]mplied antitrust immunity is not favored," *National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 388-89 (1981), and that courts should seek to "reconcile[]" statutory schemes "rather than holding one completely ousted," *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). The decision below, like those of the Second and Eighth Circuits, is fully in accord with those principles.

Petitioners, as well as the government, build their arguments on a fundamentally flawed assumption: that each *individual* union member has a right to free competition over the terms and conditions of his or her employment. There is no such right. In a collective bargaining relationship, "the employee loses the right to bargain for the best price for his or her labor." *Caldwell v. American Basketball Ass'n*, 66 F.3d 523, 528 (2d Cir. 1995).

> Subject, of course, to federal statutes specifically overriding the NLRA, such as the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, or the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the terms of the individual's employment are left exclusively to the union and the employer to determine through processes and rules mandated by the NLRA.

Id.

This principle of law is well established in this Court's precedents, a fact that those urging review simply ignore. This Court has consistently ruled that the NLRA "extinguishes the individual employee's power to order his own relations with his employer." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also J.I. Case Co. v. NLRB*, 321

U.S. 332, 338 (1944) (the purpose of collective bargaining is to "supersede the terms of separate agreements of employees").[11] Thus, as the court of appeals recognized below, "once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation — a paradigm that itself contemplates collusive activity on the parts of both employees and employers." Pet. App. 25a.

For this reason, among others, application of the nonstatutory labor exemption to the employers' exercise of their right to implement bargaining proposals at impasse does not displace or limit the scope of the antitrust laws. Nor does it cause employees "who choose collective bargaining [to have] distinctly fewer legal rights than employees who opt not to unionize." Pet. 22. It instead reflects recognition that, except to the extent that a product market may be adversely affected, individual interests of the kind protected by the antitrust laws simply do not exist in the *collectively* bargained "market" that determines the terms and conditions of union members' employment.[12]

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[11] In fact, absent union agreement, employers are barred from seeking to negotiate with individual employees. *J.I. Case*, 321 U.S. at 338-39. In that situation, "individual bargaining is not an exercise of a right to free competition under the antitrust laws; rather it is an exercise of a right derived from collective bargaining itself." *Caldwell*, 66 F.3d at 528. *Accord Silverman v. Major League Baseball Player Relations Committee, Inc.*, 1995 WL 574780 *5 (2d Cir. 1995) ("free agency is simply a collectively bargained method of determining individual salaries for one group of players"). *See* 29 U.S.C. §§ 158(d), 159(a) (obligating unionized employees to bargain collectively over wages).

[12] Employees who choose collective bargaining have *different*, not "fewer," rights compared to those who opt not to unionize. Such valuable rights include, for example, the right to negotiate as a group over wages and working conditions, the right to boycott employers (in a strike) in

Even if that were not the case, petitioners are wrong in asserting that the antitrust laws are "completely ousted" by the courts of appeals' decisions. The scope of the exemption reflected in the decision below (as well as in *Powell* and *Williams*) is narrowly tailored to reflect any necessary accommodation "between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business markets*." *Connell Constr.*, 421 U.S. at 621-22 (emphasis added).

Under the courts of appeals' decisions, the nonstatutory exemption applies only to the employers' lawful exercise, in the context of collective bargaining, of rights created under the labor laws. In the context presented here, the exemption would apply to salary terms that had been proposed in good faith during the collective bargaining process and bargained in good faith to impasse. (There is no dispute that the salary term at issue here meets that test.) And even then, the exemption would not apply if the challenged conduct adversely affected competition in the product market, or if the employers colluded with entities outside the collective bargaining relationship.

2. There is no basis whatsoever for petitioners' additional contention (Pet. 24-26) that application of the nonstatutory labor exemption in the circumstances presented here conflicts with labor preemption decisions such as *Livadas v. Bradshaw*, 114 S. Ct. 2068 (1994), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). Petitioners made

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support of their good-faith bargaining demands, and the right to seek redress under the labor laws for a failure to bargain in good faith. 29 U.S.C. § 157.

no such argument below, and the government asserts no such conflict.

This case concerns the interaction of two federal statutory schemes; the cases upon which petitioners rely concern preemption of *state* law by federal labor law. Furthermore, state laws establishing minimum wages or occupational safety standards merely limit the range of terms upon which the parties may agree. In contrast, importation of federal antitrust laws into the collective bargaining process would directly interfere with "an employer's right to 'institute unilaterally the working conditions which he desires,' [one of] the lawful 'tools of economic self-help' available to be utilized as a tactic in collective bargaining." Pet. App. 23a (quoting *American Ship Bldg. Co.*, 380 U.S. at 316).

To the extent that labor preemption principles provide a useful analogy, the most relevant principle concerns preemption of state laws regulating conduct that even "arguably" constitutes an unfair labor practice under the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). *Garmon* preemption rests on the comprehensiveness of the regulatory regime created by the NLRA and Congress' assignment of jurisdiction to a specialized tribunal, the NLRB. *Caldwell*, 66 F.3d at 527.

The same concerns are raised by petitioners' position here. Importing antitrust remedies into the collective bargaining process would disrupt the comprehensive system of labor law established by Congress; antitrust actions would give employees an incentive "never [to] resort to the NLRB" or to "institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications." *Id.* Such a result would be fundamentally inconsistent with congressional intent "to leave to the Board's specialized judgment the inevitable questions concerning multiemployer bargaining bound to arise

in the future." *NLRB v. Truck Drivers Local 449 ("Buffalo Linen")*, 353 U.S. 87, 96 (1957) (citation omitted).

II. THE COURTS OF APPEALS HAVE CORRECTLY CONCLUDED THAT THE NONSTATUTORY LABOR EXEMPTION APPLIES TO RESTRAINTS IMPLEMENTED THROUGH THE COLLECTIVE BARGAINING PROCESS THAT DO NOT ADVERSELY AFFECT A PRODUCT MARKET.

The court of appeals' decision, like those of the Eighth Circuit in *Powell* and the Second Circuit in *Williams*, is plainly correct.

There is no dispute that the nonstatutory labor exemption seeks an "accommodation between the congressional policy favoring *collective bargaining* under the NLRA and the congressional policy favoring free competition in *business markets*." *Connell Constr. Co.*, 421 U.S. at 621-22 (emphasis added). Nonetheless, without regard to the presence or absence of an impact on "competition in business markets," and notwithstanding the settled view "that federal labor policy focuses on collective bargaining as a process, rather than collective bargaining agreements alone," Pet. App. 17a; *Caldwell*, 66 F.3d at 529 & n.1, petitioners and the government would limit the exemption not to "collective bargaining under the NLRA," but rather to collective bargaining *agreements*. *See, e.g.*, Pet. 15; U.S. Br. at 14-15.

Such a limitation has been rejected by every one of the *eight* courts of appeals to address the issue.[13] It was also rejected by Judge Wald, dissenting below, who recognized "that if the collective bargaining process is to work without undue interference from antitrust law, multiemployer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7.

Petitioners and the government recognize, as they must, that the nonstatutory labor exemption protects aspects of the collective bargaining *process* other than the ultimate agreement. For example, there is no dispute that if employers exercise their labor law right to lock out their employees, their actions are protected by the nonstatutory labor exemption even though the union does not agree to the lockout. Pet. App. 22a-23a; *id.* at 53a n.7 (Wald, J., dissenting). *Accord Williams*, 45 F.3d at 691-92.[14] And that is true even though a lockout — a concerted refusal to deal — would restrain the labor "market" far more severely than the restraint at issue here.

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[13] In addition to the opinions of the six courts of appeals addressed at pages 9-12, above, *see Mid-America Regional Bargaining Ass'n v. Will County Carpenters*, 675 F.2d 881, 886 n.14 (7th Cir.) (the purpose of the non-statutory labor exemption is to protect "the collective bargaining *process* commanded by the labor laws" (emphasis in original)), *cert. denied*, 459 U.S. 860 (1982); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) ("To preserve the integrity of the negotiating *process*, employers who bargain in good faith must be entitled to claim the antitrust exemption." (Emphasis added.))

[14] *See generally, e.g., American Ship Bldg. Co. v. NLRB*, 380 U.S. at 315 (recognizing "the legitimacy of [lockouts] as a means of applying economic pressure in support of bargaining positions"); *Buffalo Linen*, 353 U.S. at 87 *et seq.*

More generally, as the dissent below recognized, "multiemployer 'bargaining tactics' must fall within the scope of the nonstatutory labor exemption." Pet. App. 53a n.7 (Wald, J., dissenting). That conclusion is inescapable because, as this Court has recognized, the collective bargaining process established by the NLRA "is premised on the belief that collective discussion *backed by the parties' economic weapons* will result in decisions that are better for both management and labor and for society as a whole." *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 678 (1981) (citations omitted) (emphasis added).[15]

This Court has previously confirmed, as the dissent acknowledged below (Pet. App. 51a), that an employer's right at impasse to "institute unilaterally the working conditions which he desires" is among the lawful "tools of economic self-help" available to be used in the collective bargaining process. *American Ship Bldg. Co.*, 380 U.S. at 316.[16] There is nothing in the case law or in federal labor policy that would warrant treating this right differently from all other "tools of

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[15] *See also NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 489 (1960) (collective bargaining process defined by "availability of economic pressure devices to each [party] to make the other party incline to agree on one's terms").

[16] Judge Wald assumed that at impasse, "an agreement is no longer in sight or even being sought," and that "hope [no longer] exists that an agreement may be reached." Pet. App. 60a, 54a. But this Court's holdings make clear that impasse, "a recurring feature of the bargaining process, . . . is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (citation omitted). *See generally* pp. 25-27, below (discussing recent collective bargaining agreements in professional football, basketball and hockey, all of which followed multiple instances of impasse in negotiations).

economic self-help" afforded to employers under the labor laws, all of which were intended by Congress to be "unrestricted by *any* governmental power to regulate." *Lodge 76 Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976) (citation omitted).[17]

Moreover, such a distinction would run counter to federal labor policy for at least two reasons. First, management's right at impasse to implement its proposed terms of employment is a necessary counterweight to the additional economic weapon that, under the federal labor laws, the union secures at impasse: the right to make *interim* agreements with individual members of the multiemployer bargaining unit, thereby gaining the opportunity to "whipsaw" management. *See Bonanno Linen*, 454 U.S. at 415-16 & n.9. The economic force of this added right is significant. As the dissenters in *Bonanno Linen* argued:

> By allowing the union to negotiate interim agreements in order to whipsaw the employer group and yet denying the employers the necessary defense of withdrawal [from the multiemployer collective bargaining unit], the Board is

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[17] Petitioners are badly mistaken in claiming that the labor law right to implement proposals at impasse "is simply a continuation of [the employers'] common law right to operate their businesses in support of their own commercial interests." Pet. 23. That unsupported assertion is conclusively undermined by the continuing labor law requirements that limit this right to terms previously negotiated with the union in good faith to impasse. *E.g.*, *NLRB v. Katz*, 369 U.S. 736, 745 (1962). These restrictions confirm that, after impasse, the parties remain in a collective bargaining relationship and that the employers' right to operate their businesses continues to be governed and regulated by the labor laws. *See also* p. 20, n.16, above.

> hardly living up to its asserted — and mandated — commitment to evenhandedness.

Id. at 423 (Burger, C.J., and Rehnquist, J., dissenting).[18] Thus, the right to implement proposals at impasse is necessary to *maintain* the balance of economic tools created by the labor laws.

Second, labor law *requires* that after impasse, members of a multiemployer bargaining unit must continue to bargain *as a unit* for a new permanent agreement; individual employers may not withdraw from the unit at that time. *See Bonanno Linen*, 454 U.S. at 412 & n.8. Thus, *voluntary* collusive actions by *independent* actors, which ordinarily motivate antitrust concerns, simply do not exist in the context of multiemployer bargaining, which "itself contemplates collusive activity on the part of both employees and employers." Pet. App. 25a.[19]

The presence of "a multiemployer organization does not alter the fact that there is no right to bargain individually, nor

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[18] The very purpose of multiemployer bargaining is to "prevent[] a union from whipsawing employers by shutting them down one-by-one, a tactic that forces each employer to give in to the union's most extreme demand." *Williams*, 45 F.3d at 688 (citing *Bonanno Linen*, 454 U.S. at 409-10 & n.3).

[19] Moreover, the NLRB and at least one court of appeals have held that sports leagues *must* engage in multiemployer bargaining from the outset. *See North Am. Soccer League v. NLRB*, 613 F.2d 1379 (5th Cir.) (affirming the NLRB's determination that teams in a soccer league must bargain as a 'joint employer'), *cert. denied*, 449 U.S. 899 (1980). *See also Williams*, 45 F.3d at 689 ("In the sports industry, multiemployer bargaining exists [in part] because some terms and conditions of employment must be the same for all teams . . . ."); *id.* at 692 ("sports leagues are an exception to the principle of voluntariness").

does it create an antitrust claim where none existed." *Caldwell*, 66 F.3d at 530. The existence of multiemployer bargaining, by which employers "band together to act as a single entity in bargaining with a common union or unions," *Williams*, 45 F.3d at 688, does, however, underscore the fact that the context in which Section 1 of the Sherman Act is traditionally applied — a market restrained by the *unauthorized* joining together of independent competitors — is simply not present here.

For these reasons, among others, it is simply wrong to suggest that unless this Court were to exclude from the scope of the exemption the labor law right to implement at impasse, the collectively bargained "playing field [would be tilted] in employers' favor." *See* Pet. App. 34a (Wald, J., dissenting).[20] Unionized employees have never had an antitrust remedy for actions taken by employers to exercise their collective bargaining rights under the labor laws.

To the contrary, importing the antitrust laws into the collective bargaining process — which could not possibly achieve the Sherman Act's objective of free competition, as demonstrated above — would, by judicial fiat, simply provide employees with an additional, inherently coercive bargaining tactic and thereby "subvert fundamental principles of our federal labor policy as set out in the [NLRA]." *Wood v.*

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[20] None of the cases cited by the dissent below (Pet. App. 37a) for the proposition "that the antitrust laws presumptively apply to [multi]employer-imposed restraints on labor markets" involved the collective bargaining process. *See, e.g., Cordova v. Bache & Co.*, 321 F. Supp. 600, 608 (S.D.N.Y. 1970) (defendants' action was not "in anticipation of, or connected in any way with, multi-employer collective bargaining").

National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).[21]

In short, *nothing* in the labor laws or in the precedents of this or any other court supports excluding from the scope of the exemption the employer's right at impasse to implement a pre-impasse proposal bargained in good faith with the union. The courts of appeals have plainly reached the correct result: "only the most crude accommodation of the federal labor and antitrust policies would shield union-employer agreements from Sherman Act liability, but leave exposed the lawful means employed in the process to reach those agreements." Pet. App. 20a.

III. THE QUESTION PRESENTED HAS NOT ARISEN OUTSIDE PROFESSIONAL SPORTS, AND RECENT EXPERIENCE DEMONSTRATES THAT THE COLLECTIVE BARGAINING PROCESS HAS NOT BEEN ADVERSELY AFFECTED BY THE DECISIONS OF THE COURTS OF APPEALS.

A. There is no basis whatsoever for petitioners' dire prediction (Pet. 26) that the court of appeals' decisions "will subvert the prospects for peaceful labor-management bargaining in major sectors of the national economy." As the Second Circuit has observed, "there is no precedent outside

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[21] Here, for example, injecting the antitrust laws into the collective bargaining process enabled the NFLPA to "invoke the antitrust laws and their threat of treble damages to gain an advantage in bargaining over a salary provision about which [NFLPA] members do not care deeply enough to strike." Pet. App. 20a. Such a radical shift in the balance between employers and employees would "cause a massive reshaping of the institution of collective bargaining." *Williams*, 45 F.3d at 691.

sports for ever initiating this genre of litigation," an antitrust challenge to the employers' implementation at impasse of its pre-impasse bargaining proposal. *Caldwell*, 66 F.3d at 530. Indeed, neither petitioners nor the government cite a single case outside the sports context — and we are aware of none — in which this issue has even arisen since the Eighth Circuit's decision over six years ago in *Powell*.

Given that the issue has arisen only rarely in the 105 years since passage of the Sherman Act — and not at all outside the sports context (which involves "a barely discernible fraction of the nation's unionized employees," *Caldwell*, 66 F.3d at 531) — there is no reason to assume that the court of appeals' decision will have a material impact on collective bargaining in any market. That is particularly true in light of the fact that the "professional sports industry has a very different history and very different economic imperatives" than other industries. *See generally Silverman*, 1995 WL 574780 at *5. *Accord*, *Wood*, 809 F.2d at 961 (collective bargaining between professional athletes and leagues raises "numerous problems with little or no precedent in standard industrial relations").

Petitioners engage in revisionist history — if not total fiction — in suggesting that recent "tumultuous" labor relations in professional sports came about "[l]argely as a result of *Powell*." Pet. 27. In *Powell* itself, which followed a strike by NFLPA members against the NFL, the Eighth Circuit referred to the "often tempestuous relationship" between players and management, a phenomenon that can be traced back to the origins of professional sports. 930 F.2d at 1303. *Powell* is no more responsible for such "tumult" than Judge Lamberth's June 1991 decision below, which allowed unions representing professional athletes to exploit, as a collective bargaining tactic, the potential for antitrust remedies if employers sought to exercise their labor law rights.

It bears mention, however, that the potential for such exploitation diminished with the July 1994 district court decision in *Williams*, which embraced the Eighth Circuit's holding in *Powell*. *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995). Not long thereafter, the National Hockey League reached agreement with its players on a new labor agreement that will continue in effect at least through the year 2000, demonstrating that "collective bargaining, instead of litigation, can operate as an effective means of union-employer dispute resolution in professional sports." Pet. App. 31a-32a. And then, following the Second Circuit's decision in *Williams* and the D.C. Circuit's decision below, the National Basketball Association and its players' union reached agreement in principle on a collective bargaining agreement that will remain in place until at least 2001; that agreement, among other things, is expected to lead to withdrawal of the petition for a writ of certiorari in *Williams*. *See* No. 95-137, Letter of Oct. 5, 1995, from Howard L. Ganz to Francis J. Lorson.

The NFL and the NFLPA now have a collective bargaining agreement that will extend until the year 2000, Pet. App. 9a n.3, and that agreement may soon be extended well into the next century.[22] Among other things, the current NFL agreement determines the salaries of practice players; consequently, the underlying issue in this case is of no continuing significance.

One thing can therefore be said without dispute: Labor relations in professional football, basketball, and hockey are now quite stable, and the prospect is that those relationships

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[22] *See, e.g.*, David Aldridge, *League And Its Players Union Can Hardly Wait To Talk Deal*, Washington Post, November 1, 1995, at C4.

will remain stable for some years to come.[23] From the standpoint of professional sports — the only industry in which an employers' right to implement at impasse has ever been challenged — there is no basis whatsoever for immediate review by this Court of the issue presented here.

B. As the court of appeals noted, those who advocate applying the antitrust laws to some part of the collective bargaining process have put forward a "dizzying array" of proposals, *not one of which has been accepted by a court of appeals*. *See* Pet App. 20a-21a (citing proposals that the exemption (i) terminate with the expiration of the collective bargaining agreement (ii) terminate at impasse (iii) terminate sometime soon after impasse); Pet. App. 50a (proposal to exclude from exemption certain collective bargaining tactics) (Wald, J., dissenting); *see also id.* at 21a (none of the proposals "makes the slightest sense under established labor law principles"). Those "who favor leaving certain aspects of the collective bargaining process unshielded by the exemption cannot agree on any point at which the exemption must expire in order to properly accommodate federal labor policy." Pet. App. 20a. The government here, for example, advances a proposal different from the proposal advanced by petitioners below, and both of those proposals differ from the proposal suggested by the sole dissenter on the court of appeals, Pet. App. 53a n.7.

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[23] The nonstatutory labor exemption has no application to professional baseball, which, unlike other professional sports, has a blanket exemption from the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972). Even if that were not the case, the nonstatutory labor exemption would not have applied to baseball's recent labor dispute, in which management did "not [even] claim that it had bargained to an impasse" over the disputed terms and conditions of employment. *Silverman*, 1995 WL 574780 at *5.

The implications of many of these proposals are unclear and potentially far-reaching. Some call into question the entire process of multiemployer bargaining. Others raise serious problems of administrability. *See* Pet. App. 21a n.6. Certiorari should not be granted to resolve such an academic debate, especially one involving an issue that has rarely arisen in the past and is not likely to arise anytime soon. Unless and until one of those proposals generates a conflict in the circuits, review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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